



Memorandum

December 17, 2002

TO: Senate Committee on Governmental Affairs
Attention: Cynthia Lesser

FROM: Jack Maskell
Legislative Attorney
American Law Division

SUBJECT: Propriety of Informal Communication from Private Regulated Financial Entity to the Federal Reserve Bank

This memorandum is provided in response to the request from the Committee, as discussed with Cynthia Lesser, as to the propriety under federal law for officials of private financial institutions to call an officer of the Federal Reserve Bank who supervises such private institutions, and to discuss with that official possible, proposed, or desired action by the Federal Reserve Bank concerning a matter regarding a third party which may affect the finances of the private financial institutions. The facts presented by the Committee, and in the press, indicate that an officer of J.P. Morgan Chase, and an officer or employee of Citigroup, called Mr. William McDonough of the Federal Reserve Bank of New York on November 8, 2001, to discuss the potential and expected credit downgrading of Enron Corporation by Moody's the next day, and its potential impact on the financial and energy markets. Although specific recollections are not clear, the calls may have explored the possibility of Federal Reserve Bank intervention into the matter to delay such downgrading, perhaps to stave off a potential blow to the financial markets similar to actions that had been taken regarding the debt of Long Term Capital corporation a few years before. Mr. McDonough apparently informed the callers, however, possibly even before any specific suggestion to intervene was made, that the Federal Reserve Bank would not intervene into this kind of situation.

Unless there are other facts revealed that indicate some specific acts of wrongdoing (such as, for example, the offering of a thing of value in return for, or for or because of, an official act, or the use of federal contract or grant monies to lobby in this situation), there is no apparent violation of any federal law for a private, regulated entity to generally communicate informally with, lobby, discuss, explore, or otherwise suggest or try to persuade officials of federal regulatory departments, agencies, government corporations or sponsored enterprises, concerning matters of public policy, economic policy, or potential governmental action concerning or into matters in which those private entities may have financial interests. It may be noted that business corporations and their representatives have been recognized to possess First Amendment rights to petition the Government and to engage

in advocacy speech with the Government (even when otherwise competitors combine to lobby the Government on a matter of mutual interest to the industry).¹ In certain instances federal departments or agencies may be involved in rule making or another specific administrative procedure or matter which would require that comments or input from outside parties be made in the context of a certain time frame and form,² but there is no indication that the Federal Reserve Bank was involved in such proceedings at that time.

¹ *Eastern Railroads President Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961). See, generally, discussion in Eastman, *Lobbying: A Constitutionally Protected Right*, American Enterprise Institute for Public Policy Research (1977).

² Note provisions of Administrative Procedures Act, at 5 U.S.C. §§ 551 *et seq.* Some agencies, in anticipation of informal contacts and communications from outside parties, require officials to “log” in such calls and communications.